

commission which refer to "commission" shall mean the environmental review appeals commission.

6-1

CHAPTER 3746-5: GENERAL APPELLATE PROCEDURE

3746-5-01. Parties to an appeal.

(A) Any person who was a party to a proceeding in which the resulting action is appealable to the environmental review appeals commission or who was aggrieved or adversely affected by an action which was not preceded by a proposed action may appeal to the commission for an order vacating or modifying the action.

(B) The environmental review appeals commission has exclusive original jurisdiction over any matter which may be brought before it.

3746-5-02. Denomination of parties.

The person appealing to the commission shall be known as the appellant and any party to a proceeding substantially supporting the finding from which the appeal is taken shall be known as the appellee.

3746-5-03 Joinder.

(A) In filing an appeal with the commission, the appellant should name as an appellee any person or persons needed for the just adjudication of the appeal.

(B) If, after filing his notice of appeal, an appellant wishes to join a person as an appellee, appellant shall file a motion with the commission requesting permission to join. The motion shall set forth in detail the reasons for joining the person as an appellee, such motion shall be served on all parties to the appeal. In no event shall a person to be joined be served with notice of such joinder less than fifteen days prior to the hearing before the commission.

(C) If, in the opinion of the commission, the appellant has failed to join any party, who the commission determines to be necessary to the resolution of the appeal, the commission may *sua sponte* order the joinder of said party.

3746-5-04 Intervention.

(A) Intervention is discretionary and subject to such terms and conditions as the commission may prescribe. The commission may grant a motion to intervene and designate the intervenor as a party to such an extent, and upon such terms, as the commission shall deem to be in accord with the statutes and rules. In the discretion of the commission, a person may be denied intervention in a matter in which he could have participated as a party, but failed to do so in a timely manner.

(B) A motion to intervene must set forth the interest of the movant in the proceeding and demonstrate all of the following:

(1) That the movant's participation will assist in the determination of

proofed to prevent access by floodwaters by raising ground levels around it above the 100-year flood elevation.”

{¶37} Additionally, Mr. Gerdeman’s affidavit fully addressed Appellants’ concerns about prong (c), proper orientation of the manure storage pond. Mr. Gerdeman averred that he observed that the surface elevation on the south side of the manure storage pond dips from 97.3 to 95.1 feet, which causes surface flow to proceed from west to east along this side of the pond. Thus, to comply with Ohio Adm.Code 901:10-2-06(A)(10)(c), (b)(6) oriented the pond so that the localized surface flow could follow a parallel path along the longest dimension of the pond. Mr. Gerdeman also stated that (b)(6) will dig a ditch designed to intercept any surface water flow before it reaches the manure storage pond wall along the pond’s south side.

{¶38} Thus, in applying the legal standard of standing to the undisputed facts before us today, the Commission is unable to find that the Askins will be aggrieved or adversely affected by ODA’s issuance of a PTI/PTO to (b)(6) to install and operate a dairy farm. Implicit in a finding that a party was aggrieved or adversely affected for purposes of R.C. 3745.04 or 3745.07 is that the party has or will suffer an injury resulting from the challenged action. The Commission is unable to find that Appellants will suffer an injury in fact that is actual and immediate, or even threatened, as there exists no realistic danger that harm will arise from the challenged action.

{¶39} Therefore, after a thorough review of all motions and responses thereto, as well as the relevant statutes, regulations, and case law, the Commission finds that Appellants failed to establish that they were aggrieved or adversely affected by the final

action of the Director. Accordingly, Appellants lack standing to challenge this action before ERAC.

ESCHLEMAN AND MULRANE, COMMISSIONERS, CONCUR

FINAL ORDER

Base upon the foregoing, (b)(6) Motion for Summary Disposition and the Director's Motion for Partial Summary Affirmance and Partial are hereby GRANTED, and Appellants' Motion for Summary Judgment is DENIED.


The Commission, in accordance with Ohio Adm.Code Section 3746-13-01, informs the parties that:

Any party adversely affected by an order of the commission may appeal to the Court of Appeals For Franklin County, or if the appeal arises from an alleged violation of law or regulation, to the court of appeals of the district in which the violation was alleged to have occurred. The party so appealing shall file with the commission a notice of appeal designating the order from which an appeal is being taken. A copy of such notice shall also be filed by the appellant with the court, and a copy shall be sent by certified mail to the director or other statutory agency. Such notices shall be filed and mailed within thirty days after the date upon which appellant received notice from the commission of the issuance of the order. No appeal bond shall be required to make an appeal effective.

**THE ENVIRONMENTAL REVIEW
APPEALS COMMISSION**



Lisa L. Eschleman, Chair



Toni E. Mulrane, Vice-Chair



Melissa M. Shilling, Member

Entered into the Journal of the
Commission this 15th
day of April 2010.

BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION

STATE OF OHIO

| | | |
|--------------------------|---|-------------------------------|
| JANE PHILLIPS, ET AL. | : | Case No. ERAC 875655, 875662, |
| | : | 875663, 875664 |
| Appellants | : | |
| v. | : | |
| | : | |
| FRED DAILEY, DIRECTOR OF | : | |
| AGRICULTURE, ET AL. | : | |
| | : | |
| Appellees. | : | Issued: November 30, 2006 |

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND FINAL ORDER

Issued By:

ENVIRONMENTAL REVIEW APPEALS
COMMISSION

Julianna F. Bull, Vice-Chair

CONCURRENCE:

Toni E. Mulrane, Chair
Melissa M. Shilling, Member

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(b)(6)

AND (b)(6) DAIRY:

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would be applied in a single application. Mr. Carry specifically stated that multiple applications of manure are permitted so long as each specific application of liquid manure does not exceed 13,000 gallons per acre. Further, Mr. Ety testified that, although a figure of 13,000 gallons per acre may serve as a limiting factor for manure application, there are several other factors in OAC 901:10-2-14 that affect the rate of manure application. By way of specific example, Mr. Ety noted that manure application is limited by the available water capacity of the soil and that the available water capacity of the soil at the time the manure is applied will largely determine the volume of liquid manure that can be applied. (Testimony, Ety; testimony Carry; CR 7-234.)

42. Mr. Ety offered his expert opinion that (b)(6) PTO application complied with all ODA regulatory requirement for CAFF PTOs. (Testimony, Ety.)

CONCLUSIONS OF LAW

1. Pursuant to R.C. 3745.05, to affirm a decision of the Director, the Commission must find it both lawful and reasonable. “Lawful” means that the action taken by the Director was in accordance with the relevant, applicable law. “Reasonable” means that the action was in accordance with reason and based on a valid factual foundation. The Commission is not to substitute its judgment for that of the Director. *Citizens Comm. to Preserve Lake Logan v. Williams* (1977), 56 Ohio App. 2d 61.

2. It is well-settled that where the Director is charged with the implementation of statutes and regulations, the Commission shall accord considerable deference to his interpretation and application of those statutes and regulations. *Ron and Pam Broering v. Dailey*, ERAC Case Number 195635, (April 13, 2005); *North Sanitary Landfill, Inc. v. Nichols* (1984), 14 Ohio App. 3d 331; *State ex rel. Celebrezze v. National Lime & Stone Co.* (1984), 68 Ohio St. 3d 377.

Subject: Manure Management Plan

Jessica and Paul,

(b)(6) Dairy has been successful in adding 1500 new acres of land to its manure management plan to replace the acreage in the Ohio EPA source protection area and the acreage withdrawn by landlords due to the appellants' harassment. With the additions and subtractions, the plan will have about 3000 acres in it, a substantial increase over the prior plan. Because the plan has to be amended to incorporate this new land, we will now have to replace some of the data used in 2004 for the acreage that is staying in the plan. While the data was current when the permit application was submitted, some of it is now out-of-date and we can't submit out-of-date data in the new plan. This includes a little of the soil test data (most of it is still valid). We also plan to replace the manure analyses that were used to calculate the nutrient budget. Again, that data was up-to-date when the permit application was submitted, but now we are replacing it with more recent data. The good news about this is that we no longer have to spar over the few soil and manure tests that we can't find, since they will no longer be used in the plan. The bad news is that we are close to the dispositive motion deadline on May 23 and the new plan will affect the issues that will be raised. So it might make sense to delay that deadline while we finish the plan. I hope that the amended plan will be finished by May 16. Once it is finished, I will share all of the supporting documentation, including soil and manure tests, with you.

Please let me know your thoughts about this.

Regards, Jack

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